NO. 07-1495

IN THE
Supreme Court of the United States

JOHN D. CERQUEIRA,
Petitioner,
v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITIONER'S REPLY

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PETITIONER'S REPLY

The petition presents important questions that arise with frequency in discrimination cases where motivation is at issue—questions on which the lower courts are split. In its brief in opposition, respondent American Airlines seeks to avoid this conclusion by recasting the questions presented to apply only to cases alleging discrimination in airline denial-of-service decisions.[1] American's arguments are unavailing. As explained below, the questions presented have application beyond aviation and, even if limited to aviation, the questions raise important issues at the intersection of safety and civil rights that should be settled by this Court.

1. This Case Is a Good Vehicle for the Court to Resolve the Ongoing Conflict Regarding the Circumstances Under Which a Defendant Is Liable for Discrimination Where Its Decisionmaker Acted on Information Tainted by the Bias of a Lower-Level Employee.

American does not dispute that 1) there is an entrenched conflict among the courts of appeals on the application of respondeat superior in discrimination cases where the challenged decision was driven by the bias of non-decisionmakers; 2) the issue is

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[1]In its fourth question presented, American purports to seek conditional review of an evidentiary issue not reached by the First Circuit, but American failed to comply with the conditional cross-petition requirements of Rule 12.5 of the Rules of this Court.

squarely presented in this case; and 3) the issue is worthy of the Court's review. Indeed, American does not deny that this is the same issue on which the Court granted certiorari in *BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. Ct. 852 (2007), but the case was dismissed on petitioner's motion. 127 S. Ct. 1931 (2007). Rather, American suggests that this case is a poor vehicle for the Court to address the issue because this case involves discrimination in airline service.

First, American argues that because courts use the arbitrary-or-capricious standard to test whether an airline has properly exercised its discretion under 49 U.S.C. § 44902(b) to refuse to transport a passenger for safety reasons, and "[t]hat test does not apply in any of the employment, retail service, or public accommodation discrimination cases" cited in the petition, "this case would not be a good one for the Court to examine the issue of nondecision-maker bias or influence in ordinary discrimination cases." Brief in Opposition (BIO) at 10. American is correct that § 44902(b) applies only to airline denial-of-service cases, but American fails to recognize that the arbitrary-or-capricious standard does not raise the bar for plaintiffs alleging intentional discrimination on account of race, because decisions motivated by discrimination are *necessarily* arbitrary and capricious. *See* Pet. at 31-32. Thus, § 44902(b) does not provide any basis for distinguishing cases alleging discrimination in air transportation from cases alleging discrimination in any other activity, and it

provides no reason to deny certiorari on petitioner's first question presented.

Second, American argues that this case is "a poor choice for examining the subordinate bias issue" because "[w]hen an air carrier makes a decision to refuse to transport a passenger for safety reasons, it thereby acts to protect the lives of all other passengers and crew members aboard the aircraft[,]" and "[t]hat consideration does not apply in Title VII or § 1981 cases arising in employment or retail service environments." BIO at 10-11. American's argument is a red herring. If an airline denies service for legitimate safety reasons, the would-be passenger will be unable to prove that discrimination drove the decision. Moreover, anti-discrimination law is routinely applied to industries and in circumstances where safety is a concern.

American next argues that the Court should not consider the subordinate-bias issue in the airline denial-of-service context because exigent circumstances may prevent a pilot from investigating the veracity of a subordinate's report of suspicious passenger behavior before ordering the passenger's removal. BIO at 11. But rather than militating against review, American's observation regarding the time pressure that pilots may face favors granting the petition because this case presents the subordinate-bias issue in two different contexts. With respect to denial-of-service decisions made by airline officials other than pilots, there is no reason

to apply the doctrine of respondeat superior differently in airline service cases than in cases alleging discrimination in other activities. In this case, American's system operations manager, Craig Marquis, made the decision to refuse service to Cerqueira on any American Airlines flight even after the police concluded their investigation and cleared Cerqueira for travel. *See* Pet. App. 66a-69a (Torruella, J., dissenting from denial of reh'g en banc); *id.* at 73a (Lipez, J., dissenting from denial of reh'g en banc). Thus, this Court's resolution of the subordinate-bias issue with regard to the rebooking decision would not be limited to the aviation context.

With regard to denial-of-service decisions made by pilots based on crewmember reports, this case presents an excellent vehicle to resolve the conflict on the specific question of whether an airline may escape liability where a pilot acts without further inquiry on reports from subordinates motivated by discrimination. The decision of the First Circuit in this case, holding that "[t]he biases of a non-decisionmaker may not be attributed to the decisionmakers" and that a pilot "is entitled to accept at face value the representations made to him by other air carrier employees," Pet. App. 30a, directly conflicts with the Ninth Circuit's conclusion that an airline may be liable for a discriminatory removal if a pilot, acting on a crewmember's report of passenger misbehavior, excludes a passenger "without even the most cursory inquiry into the complaint against him." *Cordero v. Cia Mexicana De*

Aviacion, S.A., 681 F.2d 669, 672 (9th Cir. 1982). American claims that the decisions do not conflict because *Cordero* held only that the jury was *entitled* to find that the removal decision was arbitrary and capricious because the pilot accepted at face value the flight attendant's report, but not that the pilot's failure to inquire *required* the jury to find the decision arbitrary or capricious. BIO at 12-13. American's argument is misplaced. The significance of *Cordero* is that an airline can be liable for the wrongful removal of a passenger even where the pilot who made the decision lacked discriminatory intent if the pilot acted on information supplied by a biased subordinate and did not make even a cursory inquiry into the veracity of the complaint. In this case, the First Circuit held just the opposite. Pet. App. 30a.

Even if resolution of the subordinate-bias issue in this case were limited to the aviation context, the issue would still be worthy of this Court's review because it recurs frequently and the First Circuit's decision conflicts with the government's position on the matter. As explained in the petition (at 36-38), since the terrorist attacks of September 11, 2001, the Department of Transportation (DOT) has received many complaints of discrimination by airlines against passengers perceived to be of Arab, Middle Eastern, or South Asian descent. Significantly, DOT's Enforcement Office disagrees with the First Circuit's conclusion that a pilot "is entitled to accept at face value the representations made to him by other air carrier employees." Pet. App. 30a. In its

brief in opposition, American attempts to downplay the conflict by arguing that it is only DOT's Enforcement Office and not the agency as a whole that has taken this position, but American cites no authority suggesting that any other component of DOT has taken a different view. BIO at 13-14. To the extent there is any doubt about the government's position, the Court should call for the views of the Solicitor General.

2. The Court Should Grant Certiorari to Clarify Whether, and in What Circumstances, a Plaintiff May Use Indirect Evidence to Prove Discrimination in Activities Other Than Employment.

American does not dispute that the First Circuit's refusal to apply the *McDonnell Douglas* framework to cases alleging discrimination in activities other than employment creates a conflict with the decisions of numerous other federal courts of appeals (*see* cases cited in the petition at 23-25), or that the application of *McDonnell Douglas* outside the employment context has been a source of confusion for a number of courts (*see* cases cited in the petition at 25-26). Rather, American argues that the Court should deny certiorari on the issue because American claims that there is no circuit-level split in airline denial-of-service cases, and because a case involving two separate incidents of discrimination is too complex for this Court's review. American's arguments are flawed and provide no basis to deny certiorari.

As an initial matter, American misses the point when it echoes the decision below and asserts that the *McDonnell Douglas* framework cannot be applied in airline-service cases because it is the plaintiff's burden to prove that the decision was arbitrary or capricious and thus beyond the protection of § 44902(b). BIO at 15; *see* Pet. App. 38a-39a. The issue is not whether it is the plaintiff's burden to prove discrimination (which would necessarily prove that the decision was arbitrary and capricious); rather, the issue is whether a plaintiff can meet his burden with indirect evidence.

American claims that the First Circuit's decision rejecting the *McDonnell Douglas* model in airline-service cases does not conflict with four federal court decisions cited in the petition (at 25) that applied the model in airline-service cases, but American never explains how the decisions can be reconciled. *See* BIO at 16 & n.7. Indeed, the First Circuit expressly acknowledged its disagreement with another court's use of the framework. Pet. App. 39a n. 21 ("The district court in *Dasrath* . . . did use the *McDonnell Douglas* model, in our view incorrectly." (citing *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 445 (D.N.J. 2006))).

American also asserts that this case is not a good vehicle to examine the use of indirect evidence to prove discrimination in activities other than employment because Cerqueira brought two separate claims of discrimination and that, according to

American, is a matter of "great factual complication." BIO at 17. To the contrary, having two separate claims of discrimination makes this case a particularly good vehicle to examine the issue of whether airline denial-of-service decisions are exempt from the *McDonnell Douglas* burden-shifting methodology. Indeed, Judge Torruella's dissent from denial of rehearing en banc, joined by Judge Lipez, was particularly critical of the First Circuit's rejection of the *McDonnell Douglas* model with regard to the rebooking decision. Pet App. 68a.

Similarly, American's claim that the differences between the First Circuit's panel opinion and the opinions of the judges who dissented from denial of rehearing en banc "rest largely on different views of th[e] specific factual record" is not correct. Cerqueira's petition for rehearing en banc was denied by a three-to-two vote of the active judges of the First Circuit, and the dissenting judges voiced strong disagreement with the panel opinion on purely legal issues. *See* Pet. App. 63a-73a. Moreover, given that this case was decided by a jury, differing views of the factual record would provide no reason to deny certiorari, because a reviewing court must examine the evidence in the light most favorable to preservation of the jury's verdict. At trial, Cerqueira presented direct evidence of discriminatory animus by subordinate employees who influenced the decisions, and indirect evidence of discrimination by the formal decisionmakers. The First Circuit reversed and entered judgment for American based on

its legal conclusion that Cerqueira had to rely only on direct evidence of discrimination by the formal decisionmakers, and he could not prevail under that standard. Thus, this case provides an excellent opportunity to clarify whether Cerqueira can use indirect evidence, because the outcome of the case turns on that purely legal question.

3. The Court Should Grant Certiorari to Provide Guidance on Whether § 44902(b) Limits an Airline Passenger's Right Under § 1981 to Be Free From Race Discrimination.

American claims that "[t]here is absolutely no conflict between the First Circuit's decision in this case and any other circuit court opinion addressing § 44902(b)," and observes that "the First Circuit expressly agreed with, and adopted, the Second Circuit's explanation of § 44902(b) in *Williams* and the Ninth Circuit's similar explanation in *Cordero*." BIO at 21 (citing Pet. App. 27a-28a (citing *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) and *Cordero*, 681 F.2d at 671-72)). But the First Circuit agreed with *Williams* and *Cordero* only on a point that is not in dispute; specifically, that § 44902(b) allows an airline to refuse to transport a passenger for safety reasons if the decision is not arbitrary or capricious. Indeed, the district court in this case was "convinced by the weight of persuasive authority that the 'arbitrary and capricious' standard does in fact apply." Pet. App. 45a (citing *Williams*).

The issue on which the courts are split is whether the authority granted by § 44902(b) limits anti-discrimination law. In this case, the district court held that the failure to give an explicit jury instruction on § 44902(b) and the arbitrary-and-capricious standard was not error, reasoning that "since this Court did instruct the jury that American's liability depended upon a finding of intentional discrimination on account of race, the jury verdict necessarily satisfied the standard of 'arbitrary and capricious.'" Pet. App. 47a (internal citations omitted). The First Circuit disagreed. Pet App. 36(a). It is that disagreement—based on the First Circuit's conclusion that a decision that would otherwise violate the prohibition on discrimination in 42 U.S.C. § 1981 may be protected by § 44902(b)—that puts the decision below in conflict with the Second Circuit's decision in *Williams*, 509 F.2d at 948; the Ninth Circuit's decision in *Cordero*, 681 F.2d at 672; and the district court decisions in *Shqeirat v. U.S. Airways, Inc.*, 515 F. Supp. 2d 984, 1004 (D. Minn. 2007); *Dasrath*, 467 F. Supp. 2d at 434; *Alshrafi v. American Airlines, Inc.*, 321 F. Supp. 2d 150, 162 (D. Mass. 2004); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002); and *Chowdhury v. Northwest Airlines Corp.*, 238 F. Supp. 2d 1153, 1154 (N.D. Cal. 2002). *See* Pet. at 31-34. Indeed, if the First Circuit agreed with those courts that any action that violates § 1981 is necessarily beyond the protection of § 44902(b), the First Circuit would not have rejected Cerqueira's argument that a jury instruction on § 44902(b) was unnecessary because the district

court instructed the jury that Cerqueira had to prove that American's actions were motivated by discrimination.

Not only does the First Circuit's decision conflict with the seven cases cited above, it also allows § 44902(b) to shield airlines from liability for denial-of-service decisions driven by racial stereotypes. Apparently recognizing that this holding alone is of such exceptional importance that it warrants this Court's review, American tries to wish it away by insisting that "[t]here is no 'racial profiling' issue in this case." BIO at 22. American is wrong. The jury found that, but for Cerqueira's Middle Eastern appearance, he would not have been removed from his flight and denied further service. The First Circuit's decision upholding such actions as a lawful exercise of an airline's discretion to deny transport for safety reasons allows airlines to rely on racial characteristics in deciding which passengers are dangerous. American's denial that the decision implicates racial profiling underscores the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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